

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 21, 2015

v

HOWARD JAMES MCKNIGHT,  
  
Defendant-Appellant.

No. 319979  
Wayne Circuit Court  
LC No. 13-000628-FC

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Before: BECKERING, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of kidnapping, MCL 750.349, two counts of armed robbery, MCL 750.529, first-degree criminal sexual conduct (sexual penetration occurring during any other felony), MCL 750.520b(1)(c), two counts of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant perpetrated these criminal acts on a man and woman when their vehicle became disabled in the City of Detroit after leaving the Motor City Casino. Defendant approached the victims, offered to provide assistance, then robbed them at gunpoint and raped the female victim while holding a gun to her chest. As defendant was running away from the scene, he fired three gunshots at the victims. Subsequently, a composite sketch of the perpetrator was generated and it was released to the media. An anonymous tip identified defendant as the perpetrator and, after the sketch was compared to a photograph of defendant, he was apprehended. While in police custody, defendant made several incriminating statements to three different police officers, including that he paid the female victim for sex. Defendant was subsequently identified in a corporeal lineup and at trial.

On appeal, defendant first argues that Detroit Police Officer Alphonso Tinsley's testimony that a photograph of defendant "reflects a composite sketch prepared by him" encroached on the province of the jury. We disagree.

Preserved evidentiary rulings are reviewed for an abuse of discretion, which occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008).

Officer Tinsley prepared the computer generated composite sketch of the perpetrator. During the prosecution's examination of Officer Tinsley, he was asked if he ever did any follow-up with regard to his sketches, to see how close and accurate his sketches were after a person was arrested. Officer Tinsley replied in the affirmative. Then the prosecutor showed him both the composite sketch drawn in this case and a photograph of defendant and asked if he had compared them. Officer Tinsley said that he did. The prosecutor then asked: "[I]f in fact the sketch is of that person, is there anything you would change in the work you had done?" And Officer Tinsley replied: "In this particular one, no."

Defendant appears to argue that Officer Tinsley's testimony impermissibly encroached on the province of the jury because he implied that defendant was the person in both the sketch and the photograph. In support of his argument, defendant relies on this Court's holding in *People v Fomby*, 300 Mich App 46; 831 NW2d 887 (2013). In that case, a police officer, who was also a video forensic technician, provided testimony regarding still-frame photographs of individuals that were made from a surveillance videotape of a shooting incident. *Id.* at 48-49. On appeal, the defendant challenged the testimony as invading the province of the jury, but we disagreed because the officer "did not identify defendant in the video or still images." *Id.* at 53. Noting that a witness cannot express an opinion on the defendant's guilt or innocence, we concluded that the officer "expressed no such opinion." *Id.*

Similarly, in this case, Officer Tinsley expressed no opinion on defendant's guilt or innocence of the charged offenses. Unlike in the *Fomby* case, here, a surveillance videotape of the criminal acts in progress was not available as evidence. Officer Tinsley merely testified that, comparing his composite sketch to defendant's photograph, he would make no changes to his composite sketch. He did not express any opinion as to whether defendant was, indeed, the perpetrator of the crimes. Thus, the issue whether defendant was guilty of the charged crimes was properly left to the jury. See *id.* at 52-53. However, even if the challenged testimony was improperly admitted into evidence, it was harmless. See MCL 769.26. There was overwhelming evidence of defendant's identity. Both victims identified defendant as the perpetrator and they had extensive interactions with him. Defendant also made several incriminating statements to three police officers, including that he paid the victim for sex. Accordingly, defendant has not established that any such error undermined the reliability of the verdict. See *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

Defendant also argues that Officer Kane impermissibly expressed an opinion on defendant's guilt when he testified that the warrant for defendant's arrest was based on: the composite sketch, the lineup identification by one of the victims, the proximity of defendant's residence to the crime scene (about two minutes walking), and the incriminating statements defendant made to three police officers. Defendant claims, without explanation, that Officer Kane's testimony invaded the province of the jury. But, again, Officer Kane did not express any opinion as to whether defendant was, indeed, the perpetrator of the crimes. Rather, as in *People v Heft*, 299 Mich App 69, 82-83; 829 NW2d 266 (2012), here, Officer Kane was merely explaining the steps of the police investigation from personal perception as the officer-in-charge of the case. *Id.* at 83, citing MRE 701. And this testimony was elicited on redirect examination after defense counsel had cross-examined Officer Kane as to why the police investigation focused only on defendant and not on another person of interest, implying that the police did not conduct a proper investigation into the identity of the perpetrator before defendant was arrested.

Accordingly, the trial court did not abuse its discretion in admitting Officer Kane's testimony. See *Unger*, 278 Mich App at 216-217.

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant did not move for a *Ginther*<sup>1</sup> hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. See *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). To establish a claim of ineffective assistance of counsel, the defendant must show that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *Heft*, 299 Mich App at 80-81. A defendant is prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. *Id.* at 81. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (citation omitted).

Defendant asserts that his trial counsel was ineffective for failing to object to Officer Jaber's testimony that defendant "had a case outstanding, a mug shot on file and a 'strong resemblance' to the sketch." We note that Officer Jaber's testimony explained how an anonymous tip led to the police investigation, which led to defendant's arrest. Specifically, Officer Jaber testified:

Q. Okay. And at that point in time the tip itself, did it direct you to a specific individual?

A. Yes.

Q. Okay. Was that individual named in that anonymous tip?

A. Yes.

Q. All right. And what did you do when you received that information concerning checking it out or whatever?

A. Looked up the photo, mugging photo of that name that was listed, and I compared it to a sketch that I had.

Q. And what - - do you recall what the sketch, what crime that was involving?

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A. Yeah, that was a [sic] armed robbery and CSC, a rape.

Q. Okay, that had occurred when?

A. I believe it was - - happened January 1st.

Q. Okay. And what did you do at that point?

A. Well at that point the name that I had was Howard McKnight. I ran it in LEIN, in the Law Enforcement Network.

Q. Okay. And did you do anything else?

A. Yes. I compared it to the sketch like the photo. It had a strong resemblance and when I checked his name he has a outstanding - -

Q. Okay. Now let me ask you this.

Contrary to defendant's claim, Officer Jaber did not testify that defendant had a "case outstanding." The prosecutor interrupted Officer Jaber before he was able to state what was "outstanding." Therefore, any objection that Officer Jaber's testimony was improper would have been meritless. Further, Officer Jaber's reference to a "mugging photo" was a vague and brief reference to the identification procedure used by the police. It was not inherently prejudicial or deliberately interjected into the proceedings; thus, an objection would have been meritless. See *People v Hoerl*, 88 Mich App 693, 702-703; 278 NW2d 721 (1979). And Officer Jaber's testimony that defendant's photo bore a strong resemblance to the sketch explained the identification procedure used during the police investigation and an objection would have been meritless. Because counsel is not required to make meritless or futile objections, *Eisen*, 296 Mich App at 329, defense counsel's performance did not fall below an objective standard of reasonableness. Accordingly, defendant's related claim that his counsel was ineffective for failing to move for a mistrial after Officer Jaber's testimony is without merit.

Affirmed.

/s/ Jane M. Beckering  
/s/ Mark J. Cavanagh  
/s/ Henry William Saad